PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **CYNTHIA ANN FUTTER,** A Member of the State Bar, No. 114096.	)	Case No.: **16-J-10342-YDR** **DECISION**

Introduction[1]

On September 1, 2015, the Hearing Panel before Presiding Disciplinary Judge William J. O'Neill, of the Arizona Supreme Court, filed an Agreement for Discipline by Consent, entered into by Cynthia Ann Futter (Respondent) on August 27, 2015 (Agreement). According to the Agreement, Respondent engaged in the unauthorized practice of law and violated rules 31 and 42 of the Arizona Rules of the Supreme Court as well as ER 5.5.

On October 1, 2015, Judge O'Neill filed a Final Judgment and Order in Arizona State Bar Case No. 14-O719, accepting the Agreement and reprimanding Respondent for her misconduct (Arizona Proceeding). In the Arizona Proceeding, Respondent was also ordered to pay specified costs and expenses of the State Bar of Arizona.

Business and Professions Code section 6049.1, subdivision (a), provides, in pertinent part, that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction, shall be conclusive evidence that the member is culpable of professional misconduct

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

in this state. As a result, the Office of the Chief Trial Counsel of the State Bar of California (OCTC) initiated the above-entitled proceeding pursuant to Business and Professions Code section 6049.1, subdivision (b), and Rules of Procedure of the State Bar, rules 5.350-5.354. The court admitted into evidence the Agreement and the Final Judgment and Order.

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon Respondent in California; (2) whether, as a matter of law, Respondent's culpability in the Arizona proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in California at the time of Respondent's misconduct addressed in the Arizona proceeding; and (3) whether the Arizona proceeding lacked fundamental constitutional protections. (Section 6049.1, subd. (b)).

Pursuant to section 6049.1, subdivision (b), Respondent bears the burden of establishing either: (1) that the conduct for which she was disciplined in the Arizona Proceeding would not warrant the imposition of discipline in California; or (2) that the Arizona Proceeding lacked fundamental constitutional protection.

While it has not been established that the Arizona Proceeding lacked fundamental constitutional protection, this court concludes that here, ER 5.5 warrants imposition of discipline in California under sections 6125, 6126, and 6068 subdivision (a).

This court further concludes that in light of Respondent's lengthy legal career with no prior record of discipline and other substantial mitigation, the appropriate level of discipline, among other things, is a one year public reproval.

Significant Procedural History

The State Bar initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on March 30, 2017. Respondent filed a response to the NDC on April 9, 2017.

The State Bar was represented by Deputy Trial Counsel Jamie Kim. Respondent was represented by Blithe C. Leece. Trial was held and the matter was taken under submission on June 12, 2017. The parties filed closing argument briefs on June 26, 2017.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 7, 1984, and has been a member of the State Bar of California at all times since that date.

Facts

On March 1, 2009, Respondent provided a homeowner's association in Phoenix, Arizona, Tapestry on Central (HOA), with a retainer agreement which stated that she would act as the HOA's general counsel pending retention of local counsel.

On March 16, 2009, Respondent sent a letter to a contractor involved in the HOA's construction defects matter stating, "[T]his firm has been retained as general counsel to the Board of Directors of Tapestry on Central Condominium Association ... I have been asked to respond to your letter dated March 4, 2009... The board is in the process of retaining construction defects counsel, but in the meantime, asked me to respond." In her letter, Respondent also proposed to toll the statute of limitations by way of an agreement so that the HOA and the other construction defect parties could conduct certain inspections.

On March 16, 2009, Respondent also wrote to the attorney for the developer of the HOA's complex stating that she had been retained as general counsel for the HOA and that the HOA was in the process of retaining construction defects counsel. Respondent also proposed a 90-day tolling agreement.

Respondent prepared a cause of action matrix for the HOA on March 24, 2009.

In late March 2009, the HOA terminated Respondent's legal representation and asked her to act as its business consultant by interfacing with unit owners, working with its new Arizona counsel and rendering other business consulting services. At this time, the HOA had Arizona counsel but was in the process of interviewing Arizona law firms to replace that counsel and to

assist the HOA with a construction defects matter among other matters. Respondent states that it was her intent to associate with Arizona counsel.

In March 2009, the HOA identified an Arizona firm that it would hire to replace its then-current counsel to assist the HOA with a construction defect matter, as well as other matters.

On April 14, 2009, Respondent sent a demand letter to the Chicago Title Insurance Company, on behalf of the HOA, regarding unpaid assessments and the possible assertion of a lien.

In May 2009, the HOA voted to utilize the services of the Arizona law firm, Koeller, Nebeker, Carlson, Haluck, LLP (KNCH), on an as-needed basis. The firm assisted the HOA with the construction defects matter, as well as other matters.

On June 22, 2009, Respondent sent a letter on behalf of the HOA to an attorney representing a relocating unit owner, declining a settlement offer and proposing alternative terms prior to the unit owner's relocation.

In late 2009 or early 2010, the HOA provided Respondent with a consulting services agreement, drafted by the HOA. The consulting services agreement stated that Respondent would be the lead negotiator for the HOA in its settlement process with unnamed third parties and that Respondent would assist in the direction and documentation of any settlement agreement or documents related thereto with the HOA's counsel. The agreement added that Respondent would not render any legal services in connection with the settlement process and noted that Respondent is not licensed to practice law in Arizona. The agreement stated that Respondent would provide the HOA "with technical advice and business recommendations, and is not providing legal advice" to the HOA. Respondent agreed to defer a portion of fees due to her by the HOA, until after the HOA received its recovery on the construction defects matter.

On February 1, 2010, Respondent sent a letter on behalf of the HOA to a unit owner, attempting to collect unpaid assessments.

On March 15, 2010, KNCH indicated its intent to terminate the attorney-client relationship with the HOA but continued to perform legal services until it withdrew as counsel of record in January 2011.

On November 15, 2010, Respondent sent separate letters to 14 former unit owners on the letterhead of Respondent's California legal and business consulting firm, Futter-Wells, stating that the firm represented the HOA located in Phoenix, Arizona. Respondent's letters to the former unit owners stated that the former unit owners owed a certain sum for monthly assessments and that the HOA would waive any late charges and fees if accounts were brought current by a certain date.

In December 2010, the HOA retained another Arizona attorney to assist it with its construction defects and other matters. That Arizona attorney remained HOA counsel until late 2012.

On March 3, 2011, at the request of the HOA, Respondent sent an audit response letter to the HOA's accountant informing the accountant of the status of two legal matters on which she stated her firm advised the HOA. Respondent further informed the accountant that she represented the HOA along with an Arizona firm on a matter referred to as the "Goettl matter." On September 26, 2011, at the HOA's request to help complete its audit, Respondent sent another audit response letter to the same accountant. In the September 26, 2011 letter, Respondent informed the accountant of the status of two legal matters on which she stated her firm advised the HOA. Respondent further informed the accountant that she represented the HOA along with an Arizona attorney on the "Goettl matter."

In 2013, Respondent terminated her consulting agreement with the HOA.

On September 1, 2015, the Hearing Panel before the Presiding Disciplinary Judge of the Supreme Court of Arizona filed an Agreement for Discipline by Consent ("Agreement") in State Bar No. 14-0719 (Arizona Proceeding), executed by Respondent on August 27, 2015, which provided that Respondent violated Arizona Rules of the Supreme Court rules 31 and 42 and ER

5.5, all pertaining to the unauthorized practice of law (UPL). The Agreement also provided for Respondent to pay the costs and expenses of the disciplinary proceeding.

The Presiding Disciplinary Judge of the Supreme Court of Arizona filed a Final Judgment and Order in the Arizona Proceeding on October 1, 2015. The Final Judgment accepted the Agreement and reprimanded Respondent for her misconduct. Respondent was also ordered to pay costs and expenses to the State Bar of Arizona.

Respondent stipulated to the following Legal Grounds in Support of Sanction in the Agreement with the State Bar of Arizona:

> "The parties agree that Standard 7.3 applies given the facts and circumstances of this matter. Standard 7.3 states: "Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system." Respondent believed that she was hired to serve as the HOA's business consultant, not its attorney. Respondent further believed that the services she provided to the HOA over the years were business-consulting services, not legal services. In retrospect, however, Respondent recognizes and admits that the discrete acts identified above could have been misinterpreted by third parties as including the practice of law. Respondent recognizes and admits that the word 'represent' can be taken by third parties to mean representation as counsel in the practice of law and not as a business consultant and that the use of the word 'represent' in this context was negligent.
>
> **The duty violated**
> As described above, Respondent's conduct violated her duty to the profession.
>
> **The lawyer's mental state**
> For purposes of this agreement, the parties agree that **Respondent negligently engaged in the unauthorized practice of law in Arizona** and that her conduct was in violation of the Rules of Professional Conduct. (emphasis added.)
>
> **The extent of the actual or potential injury**
> For purposes of this agreement, the parties agree that there was potential harm to the profession.
>
> **Aggravating and mitigating circumstances**
> The presumptive sanction in this matter is reprimand. The parties conditionally agree that the following aggravating and mitigating factors should be considered.
>
> **In aggravation:**
> Standard 9.22(i): Substantial experience in the practice of law. Respondent has been licensed to practice law in California since 1984.
>
> **In mitigation:**
> Standard 9.32(a): Absence of a prior disciplinary record. Respondent has not been disciplined in California or in Arizona previously.
>
> **Standard 9.32(b): Lack of a dishonest or selfish motive.** (emphasis added.)

Standard 9.32(e): Full and free disclosure to disciplinary board or cooperative attitude toward proceedings."

Conclusions of Law

Violations of the Arizona Rules of Professional Conduct

As noted above, Respondent stipulated to, and the Presiding Disciplinary Judge of the Supreme Court of Arizona found, that Respondent violated Arizona R. Sup. Ct. Rules 31 and 42, and ER 5.5.[2] ER 5.5 is the applicable rule in this proceeding. ER 5.5 states, [in pertinent part, that "[A] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." ER 5.5 further provides that "a lawyer who is not admitted to practice in Arizona shall not: (1) engage in the regular practice of Arizona law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice Arizona law."

Respondent has been admitted to practice law in the state of California since 1984. She has never been admitted as a lawyer in Arizona. Yet, she not only performed legal services for the HOA, she held herself out to others, on multiple occasions, as "general counsel" to the HOA. In the Arizona Proceeding, Respondent stipulated that she violated Arizona ER 5.5.

Application of California Laws

The OCTC contends that Respondent's misconduct gives rise to culpability in violation of Business and Professions Code sections 6125, 6126, and 6068, subdivision (a), 6106 and rule 4-200(A) of the Rules of Professional Conduct. This court agrees with respect to sections 6125, 6126 and 6068, subdivision (a). However, based on the findings in the Arizona Proceeding, this

[2] The Arizona Supreme Court concluded Respondent was culpable of violating rules 31 and 32 and ER 5.5 of the Arizona Rules of the Supreme Court, which all pertain to the unauthorized practice of law. Here, the only Arizona violation relevant to the charged violation of California 1-300(B) is Arizona ER 5.5. The individual rules of the Arizona Rules of Professional Conduct are referred to as "Ethical Rules", abbreviated and cited as "ER".

court concludes that as a matter of law, Respondent is not culpable with respect to section 6106 or rule 4-200(A).

Sections 6125 and 6126 [Unauthorized Practice of Law]

Section 6125 provides that only active members of the State Bar may lawfully practice law in California. Similarly, section 6126 prohibits any person from "advertising or holding himself or herself out as practicing or entitled to practice law who is not an active member of the State Bar." Respondent contends that she should have, but wasn't charged with a violation of rule 1-300(B) of the Rules of Professional Conduct[3], "commonly referred to as 'vanilla UPL'". Although the OCTC did not charge Respondent with violation of rule 1-300(B), the fact that Respondent stipulated that she engaged in the unauthorized practice of law and thus violated ER 5.5, establishes her violation of sections 6125 and 6126.

Section 6068, subd. (a) [Duty to Support the Constitution and Laws]

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution, the laws of the United States and the state of California. Respondent concedes, and this court finds that by violating ER 5.5, Respondent willfully violated section 6068, subd. (a).

Section 6106 [Moral Turpitude]

Section 6106 provides in part, that the commission of any act involving dishonesty, moral turpitude or corruption, constitutes cause for suspension or disbarment. OCTC argues that having willfully or purposely committed the unauthorized practice of law, Respondent should be found culpable for moral turpitude, notwithstanding that Respondent may not have acted with bad faith or the intent to commit the UPL. (See *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676; *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The OCTC

[3] Rule 1-300(B) provides that an attorney must not practice law in a jurisdiction where to do so would be in violation of the regulations of that jurisdiction.

also contends that "negligent" acts can be willful and can thus give rise to culpability for moral turpitude. (*In the Matter of Downey* (Review Dept. 2009), 5 Cal. State Bar Ct. Rptr. 151, 155)

Citing *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 384, Respondent points out that moral turpitude requires gross negligence or some level of "guilty knowledge". Respondent's argument is bolstered by *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241: "[a]lthough the term 'moral turpitude' found in section 6106 has been defined very broadly by the Court (e.g., *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110), the Supreme Court has always required a certain level of intent, guilty knowledge or willfulness before placing the serious label of moral turpitude on the attorney's conduct. (citations omitted.) At the very least, gross negligence has been required. (See *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 475-476; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91.)"

The Arizona tribunal did not find that Respondent was culpable of either gross negligence or dishonesty in connection with her UPL misconduct. To the contrary, the Arizona tribunal determined that "Respondent negligently engaged in the unauthorized practice of law in Arizona" and that her misconduct reflected a "[l]ack of dishonest or selfish motive". (Exhibit 003-0009).

Accordingly, absent a finding of gross negligence or intentional misconduct in her commission of the unauthorized practice of law, section 6106 is inapplicable.

Rule 4-200(A) [Illegal Fee])

Rule 4-200(A) provides that an attorney must not charge, collect or enter into an agreement for an illegal or unconscionable fee. Here, the OCTC has not established by clear and convincing evidence that Respondent collected any illegal fees for the unauthorized legal services she provided. As explained in the Agreement For Discipline filed in the Arizona

Proceeding, "Respondent filed a complaint against the HOA for failing to pay her fees. The HOA filed a counterclaim [in California] alleging that Respondent engaged in the unauthorized practice of law in Arizona and, therefore, that the HOA is entitled to disgorgement of fees that it paid Respondent." (Exhibit 3-0007). The Agreement does not clearly establish that Respondent was ever paid the fees she charged and, if so, that she was paid fees for the unauthorized legal services as opposed to any non-legal consulting services she provided.

Respondent is not culpable under Rule 4-200(A) which also appears to be inapplicable as there is no violation of a similar statute or finding of such in the Arizona Proceeding and Respondent's violation of ER 5.5 does not demonstrate a violation of rule 4-200(A).

Aggravation[4]

This court finds no aggravating factors.

Mitigation

It is Respondent's burden to prove mitigating circumstances by clear and convincing evidence. (Std. 1.6.) This court finds Respondent has established three mitigating factors.

No Prior Record of Discipline (Std. 1.6(a).)

Respondent was admitted to practice law in California in 1984, and has no prior record of discipline. Her 25 years of discipline-free conduct prior to the present misconduct warrants highly substantial consideration in mitigation. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with an unblemished record is highly significant mitigation].)

Candor and Cooperation (Std. 1.6(e).)

Respondent is entitled to significant mitigation for cooperating with the OCTC by entering into a stipulation as to facts and culpability which conserved OCTC resources and

[4] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

assisted the OCTC in prosecution of this case. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [where appropriate, more extensive weight in mitigation is accorded to those who admit to culpability as well as facts].

Extraordinary Good Moral Character (Std. 1.6(f).)

In this proceeding, Respondent submitted 20 good character declarations from a range of declarants: 5 attorneys, 13 business owners and others who attested that they were knowledgeable about Respondent's culpability in the Arizona Proceeding and the nature of this proceeding, yet in their view, Respondent is highly ethical, honest and trustworthy. In addition, Respondent submitted ten declarations from individuals knowledgeable about various pro bono and community services she has provided others. Not only has she mentored members of her community, Respondent has partnered with various hardware store owners and set-up the Bigger Cube Foundation to provide lumber to orphanages, elementary schools and other institutions to build much-needed facilities in Nicaragua.

Based on these admitted declarations, Respondent has established by clear and convincing evidence that she is entitled to substantial mitigation credit for extraordinary good moral character, her pro bono and community activities.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d. 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d. 1016, 1025; Std. 1.1.)

In determining the level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d. 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). Second, the court looks to decisional law. *(Snyder v.*

State Bar (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

In this case, the standards call for the imposition of a sanction ranging from actual suspension to disbarment. Standard 2.10(a) and standard 2.12(a) both provide that disbarment or actual suspension is the presumed sanction when an attorney engages in the unauthorized practice of law or violates the duties required of an attorney under section 6068(a).

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar, arguing that Respondent should be found culpable of moral turpitude as well as the unauthorized practice of law, requested, among other things, that Respondent be actually suspended for 30 days. Respondent, on the other hand, argued that a private reproval with public disclosure is the appropriate level of discipline. Turning to the applicable case law, the court finds guidance in *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330.

In *Yee*, the attorney mistakenly recalled that she had completed her required MCLE courses and did not check or maintain any records to confirm if her recollection was accurate. *Yee* committed a single act of moral turpitude based on gross negligence. Based in large part on Yee's substantial mitigation and that fact that her misconduct was found to be an aberrational event occurring during a 22-year unblemished legal career , Yee was publicly reproved.

Here, Respondent communicated with others in a manner that could have led them to believe she was an Arizona admitted attorney. While she argued that her seven statements regarding "representation" of the HOA were made regarding her role as a business consultant to the HOA, Respondent stipulated, and the Arizona tribunal found, that she was culpable under ER 5.5 for the unauthorized practice of law. Significantly, however, the Arizona tribunal did not find that Respondent's UPL was committed with moral turpitude as there was no finding of gross negligence or dishonesty. Based on its findings, the level of discipline imposed on Respondent in the Arizona Proceeding was a reprimand and payment of specified costs and expenses.

The aberrational nature of Respondent's misconduct, coupled with Respondent's 25 years of practice with no prior record of discipline, justify deviation from the presumed sanction laid out in standard 2.12(a). Therefore, after thorough consideration of the findings and discipline imposed in the Arizona Proceeding and, in view of Respondent's misconduct, the case law, the standards, and the substantial mitigating factors, this court concludes that, among other things, a public reproval is appropriate, and provides adequate protection for the courts, the public, and the legal profession.

Recommendations

It is ordered that respondent Cynthia Ann Futter, State Bar Number 114096, is publicly reproved for one year. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, the public reproval will be effective when this decision becomes final. Furthermore, pursuant to California Rules of Court, rule 9.19(a), and rule 5.128 of the Rules of Procedure, the court finds that the interest of Respondent and the protection of the public will be served by the following specified conditions being attached to the public reproval imposed in this matter:[5]

[5] Failure to comply with any condition(s) attached to the public reproval may constitute cause for a separate proceeding for willful breach of rule 1-110 of the State Bar Rules of Professional Conduct.

1. Within one year after the effective date of this order, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

2. Respondent must take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of this order and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: September 8, 2017

YVETTE D. ROLAND
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on September 8, 2017, I deposited a true copy of the following document(s):

DECISION

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

BLITHE C. LEECE
CARR WOODALL
10808 S RIVER FRONT PKWY
STE 175
SOUTH JORDAN, UT 84095 - 5961

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Jamie J. Kim, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on September 8, 2017.

Angela Carpenter
Case Administrator
State Bar Court